

**SIDLEY & AUSTIN**  
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

DOCKET FILE COPY ORIGINAL

CHICAGO  
DALLAS  
LOS ANGELES

1722 EYE STREET, N.W.  
WASHINGTON, D.C. 20006  
TELEPHONE 202 736 8000  
FACSIMILE 202 736 8711

FOUNDED 1866

NEW YORK  
LONDON  
SINGAPORE  
TOKYO

WRITER'S DIRECT NUMBER  
(202) 736-8236

May 19, 2000

RECEIVED

MAY 19 2000

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REDACTED – FOR PUBLIC INSPECTION**

**BY COURIER**

Magalie Roman Salas  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W. -- Room TWB-204  
Washington, D.C. 20554

Re: CC Docket 00-65, Application of SBC Communications, Inc., et al. for the  
Provision of In-Region, InterLATA Services In Texas

Dear Ms. Salas:

Pursuant to the Public Notice issued on April 6, 2000, please find enclosed the Supplemental Reply Comments of AT&T Corp In Opposition to SBC's Section 271 Application for Texas. AT&T is submitting an original and two copies of its Comments and supporting exhibits in redacted form.

AT&T is also submitting under seal the portions of its comments and supporting exhibits that contain material designated as confidential pursuant to the Protective Order in this matter and in CC Docket 00-4. These pages bear a legend indicating that they are confidential.

Finally, also enclosed is a CD-ROM that contains the portions of AT&T's redacted submission that exist in electronic form. If there are any questions concerning AT&T's submission in this matter, including matters relating to AT&T's confidential submission, please do not hesitate to contact me. Thank you for your attention to this matter.

Sincerely,

*Michael J. Hunseder*  
Michael J. Hunseder

Enclosures

No. of Copies rec'd 042  
List A B C D E

DOCKET FILE COPY ORIGINAL

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of

Application of SBC Communications Inc.,  
Southwestern Bell Telephone Company,  
And Southwestern Bell Communications  
Services, Inc. d/b/a Southwestern Bell Long  
Distance for Provision of In-Region  
InterLATA Services in Texas

RECEIVED  
MAY 19 2000  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY  
CC Docket

**SUPPLEMENTAL REPLY COMMENTS OF AT&T CORP. IN OPPOSITION TO  
SBC'S SECOND SECTION 271 APPLICATION FOR TEXAS**

Mark C. Rosenblum  
Roy E. Hoffinger  
Dina Mack  
295 North Maple Avenue  
Basking Ridge, NJ 07920  
(908) 221-4343

Mark Witcher  
Michelle Bourianoff  
919 Congress Avenue, Suite 900  
Austin, Texas 78701-2444  
(512) 370-2073

David W. Carpenter  
Mark E. Haddad  
Ronald S. Flagg  
Richard E. Young  
Michael J. Hunseder  
Ronald L. Steiner  
SIDLEY & AUSTIN  
555 W. Fifth Street, Suite 4000  
Los Angeles, CA 90013

James L. Casserly  
James J. Valentino  
Uzoma C. Onyeije  
MINTZ, LEVIN, COHN, FERRIS,  
GLOVSKY & POPEO, P.C.  
701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2608  
(202) 434-7300

**ATTORNEYS FOR AT&T CORP.**

May 19, 2000

ORIGINAL

REDACTED

FOR PUBLIC INSPECTION

## TABLE OF CONTENTS

INTRODUCTION AND SUMMARY.....	1
I. SBC DISCRIMINATES AGAINST CLECS IN THE PROVISION OF ADVANCED SERVICES.....	7
A. SBC Discriminates Against UNE-P CLECs .....	8
B. SBC Discriminates In The Provision Of Line Sharing.....	9
1. SBC Discriminates By Providing Line Sharing Only To ASI.....	10
2. SBC Will Not Implement The Line Sharing Order On Time .....	10
C. SBC Discriminates In The Provision Of Second Loops.....	13
1. Provisioning Discrimination .....	13
2. Unreconciled, Unreliable Data.....	15
D. SBC’s Project Pronto Architecture Is Discriminatory .....	15
E. SBC’s Data Affiliate Does Not Cure SBC’s Discrimination.....	16
II. SBC IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO HOT CUT LOOPS.....	18
A. SBC Causes Significantly More Outages Than Did Bell Atlantic .....	19
1. SBC Should Be Held Accountable For Its FDT Outages.....	23
2. SBC Should Be Held Accountable For Early Cutovers .....	26
3. SBC Should Be Held Accountable For Outages Caused By Its Flawed Software.....	28
4. SBC’s Outage Rate Should Be Measured Based On Orders .....	31
B. SBC’s On-Time Performance Is Inferior To Bell Atlantic’s .....	33
C. SBC’s Reported Trouble Rate Is Too High .....	35
D. SBCs Flawed Data Collection Processes And Incomplete Performance Measures Also Deny CLECs A Meaningful Opportunity To Compete .....	36
III. SBC HAS NOT ESTABLISHED COST-BASED RATES FOR THE UNE- PLATFORM.....	36
IV. SBC’S PERFORMANCE REPORTS CONFIRM ITS CHECKLIST NONCOMPLIANCE .....	37
V. SBC FAILS TO PROVIDE NONDISCRIMINATORY ACCESS TO OSS. ....	39
A. SBC Has Not Provided CLECs With the Ability to Integrate Its Pre- ordering and Ordering Interfaces.....	39
B. SBC’s Rejection Rates Remain Unacceptably High.....	42

## **TABLE OF CONTENTS (cont.)**

C.	SBC Has Not Demonstrated That Its OSS Are Operationally Ready.....	44
D.	The TPUC’s Reliance on Post-Regulatory Mechanisms Is Misplaced.....	44
VI.	SBC’S INTELLECTUAL PROPERTY RESTRICTIONS PRECLUDE A FINDING OF CHECKLIST COMPLIANCE. ....	45
VII.	SBC IS UNLAWFULLY RESTRICTING ACCESS TO COMBINATIONS OF ELEMENTS.....	48
VIII.	SBC DENIES TECHNICALLY FEASIBLE INTERCONNECTION .....	49
	CONCLUSION .....	50

## FCC ORDERS CITED

SHORT CITE	FULL CITE
<u>Ameritech Michigan Order</u>	Memorandum Opinion and Order, <u>Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan</u> , 12 FCC Rcd. 20543 (1997).
<u>NY Order</u>	Memorandum Opinion and Order, <u>Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York</u> , CC Dkt. No. 99-295, 1999 WL 1243135 (rel. Dec. 22, 1999), <u>appeal pending sub nom. AT&amp;T Corp. et al. v. FCC</u> , No. 99-1538 (D.C. Cir.)
<u>Line Sharing Order</u>	Third Report and Order, <u>Deployment of Wireline Service Offering Advanced Telecommunications Capability</u> , CC Dkt. No. 98-147 and Fourth Report and Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , CC Dkt. No. 96-98, 14 FCC Rcd. 20912 (rel. Dec. 9, 1999).
<u>Local Competition Order</u>	First Report and Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , 11 FCC Rcd. 15499 (1996), <u>aff'd in part and vacated in part by Iowa Utils. Bd. v. FCC</u> , 120 F.3d 753 (8th Cir. 1997), <u>aff'd in part and rev'd in part by AT&amp;T Corp. v. Iowa Utils. Bd.</u> , 119 S. Ct. 721 (1999).
<u>SBC-Ameritech Order</u>	Memorandum Opinion and Order, <u>Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations</u> , CC Dkt. No. 98-141, 14 FCC Rcd. 14712 809551 (rel. Oct. 8, 1999), <u>app. pend. sub. nom. Telecommunications Resellers Ass'n v. FCC</u> , Case No. 99-1441 (D.C. Cir.).
<u>Louisiana II Order</u>	Memorandum Opinion and Order, <u>Application of BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services in Louisiana</u> , 13 FCC Rcd. 20599 (1998).
<u>MCI Order</u>	Memorandum Opinion and Order, <u>Petition of MCI for Declaratory Ruling</u> , CCB Pol. 97-4, FCC No. 00-139 (rel. April 27, 2000)

SHORT CITE	FULL CITE
<u>UNE Remand Order</u>	Third Report and Order, <u>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</u> , CC Dkt. No. 96-98, 1999 WL 1008985 (rel. Nov. 5, 1999).

### MISCELLANEOUS PLEADINGS CITED

CPUC DSL Ex Parte	Letter from Gretchen T. Dumas, Senior Staff Counsel, Public Utilities Commission, State of California to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 98-147 (April 21, 2000) (Attachment 2)
DOJ I	Evaluation of the United States Department of Justice, <u>Application by SBC Communications, Inc, et al. for Provision of In-Region, InterLATA Services in Texas</u> , CC Docket No. 00-4 (February 14, 2000)
DOJ II	Evaluation of the United States Department of Justice, <u>Application by SBC Communications, Inc, et al. for Provision of In-Region, InterLATA Services in Texas</u> , CC Docket No. 00-65 (May 12, 2000)
DOJ NY Eval.	Evaluation of the United States Department of Justice, <u>Application by Bell Atlantic for Provision of In-Region, InterLATA Services in New York</u> , CC Docket No. 99-295 (Nov. 1, 1999)
DOJ 3/20 Ex Parte	Letter from Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division, Department of Justice to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket 00-4 (March 20, 2000)
TPUC I	Evaluation of the Texas Public Utilities Commission, <u>Application by SBC Communications, Inc, et al. for Provision of In-Region, InterLATA Services in Texas</u> , CC Docket No. 00-4 (January 31, 2000)

TPUC II	Evaluation of the Texas Public Utilities Commission, <u>Application by SBC Communications, Inc, et al. for</u> <u>Provision of In-Region, InterLATA Services in Texas, CC</u> Docket No. 00-65 (April 26, 2000)
TPUC I Reply	Reply Comments of Texas Public Utilities Commission, <u>Application by SBC Communications, Inc, et al. for</u> <u>Provision of In-Region, InterLATA Services in Texas, CC</u> Docket No. 00-4 (February 22, 2000)

**APPENDIX TO SUPPLEMENTAL REPLY COMMENTS OF AT&T CORP.  
IN OPPOSITION TO SBC's SECTION 271 APPLICATION FOR TEXAS**

**CC Docket No. 00-65**

<b>EXH.</b>	<b>DECLARANT</b>	<b>SUBJECT(S) COVERED</b>	<b>RELEVANT STATUTORY PROVISIONS</b>
H	Robert Dapkiewicz	AT&T Market Entry – Business	§ 271(c)(2)(B)(ii), (iv), (xi); § 271 (d)(3)(C)
I	Sarah DeYoung/Mark Van de Water	UNE Loop Provisioning–Hot Cuts	§ 271(c)(2)(B)(ii), (iv), (xi)
J	Julie S. Chambers/ Sarah DeYoung	Operations Support Systems	§ 271(c)(2)(B)(ii), (iv), (x)
K	Julie S. Chambers	Pricing – Glue Charges	§ 271(c)(2)(B)(ii); § 271(d)(3)(C)
L	Sarah DeYoung/Eva Fettig	Interconnection	§ 271(c)(2)(B)(i)
M	C. Michael Pfau	Performance Measurements	§ 271(c)(2)(B)(i), (ii); § 271(d)(3)(C)

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of )  
 )  
Application of SBC Communications Inc., )  
Southwestern Bell Telephone Company, ) CC Docket 00-65  
And Southwestern Bell Communications )  
Services, Inc. d/b/a Southwestern Bell Long )  
Distance for Provision of In-Region )  
InterLATA Services in Texas )

**SUPPLEMENTAL REPLY COMMENTS OF AT&T CORP. IN OPPOSITION  
TO SBC'S SECOND SECTION 271 APPLICATION FOR TEXAS**

AT&T Corp. ("AT&T") respectfully submits these reply comments on the second application of SBC Communications, Inc., et. al. ("SBC") for interLATA authority in Texas.

**INTRODUCTION AND SUMMARY**

The comments have vividly confirmed that SBC's second Texas application should be denied. As the Justice Department has explained, this application merely repackaged the same performance data and other evidence that SBC submitted during the proceedings on its first application and that the Justice Department and other commenters there evaluated and demonstrated to fall far short of satisfying § 271's competitive checklist. Under the Commission's "complete when filed" rule, the insufficiency of this evidence mandates denial of the application. See Ameritech Michigan Order ¶¶ 49-59; DOJ II 3-4 & n.8.

SBC has tacitly recognized the insufficiency of its application, for even before comments were filed, SBC made a post-application submission of March performance data that obviously did not respond to comments and thus violated the Commission's rules. Although this and any future such filing should be disregarded,<sup>1</sup> the undisputed facts in this record overwhelmingly

---

<sup>1</sup> Should the Commission consider these or other post-February evidentiary submissions from SBC, it should give all parties (not just DOJ) an opportunity to respond free of the page limits that are part of the "complete when filed" rule.

confirm that there are at least eight fundamental respects in which SBC has not yet fully implemented its checklist obligations. Indeed, the only substantive support for SBC comes from the Texas Public Utilities Commission (“TPUC”), whose comments, as discussed further below, *do not address most of these defects.*

First, the record confirms SBC’s stark discrimination against CLECs with respect to each of the means by which CLECs seek to use SBC’s unbundled network elements to offer advanced services. These denials of nondiscriminatory access to unbundled network elements each violate section 251(c)(3), and each demonstrate a failure to fully implement items (ii) and (iv) of the competitive checklist.

For example, the record demonstrates that CLECs seeking access to the full capability of the unbundled loop to offer customers a package of voice and data services are prevented from doing so by SBC’s categorical and unlawful refusal to permit them such access. That refusal not only violates the plain language of the Act and this Commission’s rules, it contradicts SBC’s explicit warrants to the contrary in its reply comments on the last application. The TPUC neither acknowledges this issue nor defends SBC’s change-of-position.

Also unaddressed by the TPUC is SBC’s flagrant discrimination against CLECs seeking unbundled access to the high frequency portion of the loop, which SBC today provides only to its own affiliate. This denial of access to an unbundled network element violates section 251(c)(3) today. This violation will continue into the future, moreover, because SBC’s bad faith in negotiating terms for line sharing and SBC’s protracted implementation will continue to deny CLECs access to line sharing even after the effective date of the Line Sharing Order.

With respect to the provision of unbundled loops for xDSL service, the record confirms that there is no evidentiary basis to support SBC’s excuses for its non-compliance with two of the five critical measures of non-discriminatory performance. The record further confirms that the emergence of SBC’s affiliate has only underscored how starkly and consistently SBC favors ASI

at the expense of other CLECs. Finally, the record confirms that SBC's Project Pronto Architecture, together with SBC's failure to establish terms, conditions, and procedures for providing CLECs access to equipped loops (per the UNE-Remand Order ¶ 69), will deny CLECs *nondiscriminatory access* to SBC's network elements to provide the telecommunications services they seek to offer.

Second, SBC and AT&T have jointly reconciled the data on SBC's hot cut loop provisioning under the standards adopted in the Commission's NY Order. The jointly reconciled data conclusively establish that SBC has failed to satisfy the standards for outages (fewer than 5%) and for on-time performance (90% of orders) that the Commission found "minimally acceptable." Here the data show that SBC caused outages on 16.7% of AT&T's orders and provisioned only 85.47% of lines on-time, and that each of these figures substantially overstates the quality of SBC's performance.

Rather than address the reconciled data as jointly reported by the parties, the TPUC relies heavily on gerrymandered subsets of data prepared by SBC that exclude from consideration significant categories of performance that were included in the Commission's analysis of Bell Atlantic's performance in the NY Order. In particular, to calculate an artificially more appealing outage rate, SBC excludes all outages due to early cutovers, all outages caused by an SBC software error, and all outages on orders provisioned through the FDT process, and then restates the results on the basis of lines rather than orders. Similarly, for on-time performance, the TPUC considers only one of the two categories of performance on which the Bell Atlantic's performance was judged. But while the TPUC has focused in each instance on only carefully-selected fragments of SBC's provisioning performance, it borrows without modification the comprehensive standards that this Commission applied to all aspects of Bell Atlantic's provisioning performance. The TPUC does not defend this mixing and matching of the NY Order's standards with different, and far more narrow, categories of hot cut performance.

Third, SBC has recently imposed yet another obstacle to the availability of cost-based rates for combinations of unbundled network elements. Contrary to SBC's representation in its prior reply comments, SBC now refuses even to suspend its unlawful glue charges for UNE-P orders. Rather, it conditions that suspension on the agreement by a CLEC to waive its right to contest the "true-up" that it seeks to have the TPUC impose. SBC has thus reinforced once again its intention to recover these glue charges not simply on a prospective basis, if the TPUC approves them at the conclusion of pending state pricing proceedings, but retroactively with respect to every UNE-P order submitted throughout these proceedings. Given SBC's concession (not mentioned by the TPUC) that these charges have never to date been supported by any forward-looking cost study, there can be no basis for a finding that SBC today is providing access to combinations of network elements at cost-based rates.

Fourth, the TPUC also does not mention that SBC has violated the "Tier 2" performance measures that the TPUC adopted as "the most customer and competition affecting" measures (TPUC I 106) and that were designed, in the TPUC's words, to "provide objective data to determine whether SWBT has satisfied the competitive checklist" (*id.* 105). In particular, between December 1999 and February 2000, SBC was fined nearly \$1 million for sustained violations of these "competition affecting" measures. Indeed, even including SBC's reported results for March, it remains true that SBC has never managed to pass the unduly generous overall performance test for even one month – let alone for two out of three consecutive months, which was what SBC and the TPUC initially agreed should be the prerequisite to TPUC support for SBC's 271 application.

Fifth, the objective data similarly establishes that SBC is not yet affording nondiscriminatory access to its OSS. For example, the TPUC recognizes that it is critical that SBC provide integration of ordering and pre-ordering and that it improve its rejection rates. However, the evidence shows that SBC has done neither. In particular, in stating that SBC has

achieved “successful integration,” the TPUC cites CLEC comments that explain in detail that SBC has not done so, and the data it cites actually show not “improvement” but rather deterioration in reject rates. The TPUC does not comment on other significant OSS deficiencies about which DOJ and CLECs have repeatedly expressed concern.

Sixth, despite the clear statements of both the Fourth Circuit Court of Appeals and now this Commission that the Act requires ILECs to use their best efforts to obtain co-extensive intellectual property rights, SBC not only has failed to make such efforts but has refused to bind itself legally to do so. Instead, it continues to exploit this issue to impede competition.

Seventh, in addition to the unlawful use restrictions on EELs, SBC has just recently disclosed a new restriction on access to the UNE-Platform. It is now unlawfully barring competing carriers from access to UNE-P where it has deployed “fiber to the curb.”

Eighth, SBC continues to deny AT&T interconnection at all technically feasible points of access, thus imposing substantial and needless costs and delays on facilities-based local entry.

Despite these remaining, serious defects in SBC’s application, it is understandable that the TPUC would support SBC’s application. Prior to SBC’s 271 filing, the TPUC diligently engaged in conscientious efforts to force SBC to implement the requirements of the competitive checklist. In view of SBC’s extraordinary hostility to the 1996 Act and to its pro-competitive objectives, it is a major achievement for the TPUC to have brought SBC this far. The TPUC may well believe that the deficiencies in SBC’s performance are minor compared to the progress that SBC has made, and that a grant of long distance authority to SBC now is appropriate.

But in reaching its judgment that SBC’s application should be approved, the TPUC has overlooked numerous aspects of SBC’s performance that fall short of full implementation. As noted above, the TPUC fails to discuss much of SBC’s discrimination in providing access to network elements necessary for providing advanced services. Similarly, the TPUC’s analysis of SBC’s hot cut provisioning overlooks the data that SBC and AT&T jointly reconciled under the

standards of the NY Order, in favor of artificially tailored data that SBC contrived and on which no CLEC was given an opportunity to comment. And the TPUC does not address SBC's undisputed violations of the TPUC's own "Tier 2" performance measures that led to fines in December, January, and February, even though the TPUC designed these measures to provide "objective data" of whether SBC "has satisfied the competitive checklist."

The TPUC's support for SBC in the face of these and other unaddressed deficiencies evidently represents a policy judgment by the state commission that SBC's continued discrimination and failure fully to implement the checklist should not foreclose it from providing long distance service. This is a judgment, however, that Congress squarely rejected in § 271. Congress adopted federal requirements to open local monopolies to competition and prohibited the grant of interLATA authority to a BOC unless and until it satisfied requirements of federal law that apply uniformly throughout the nation and that mean the same thing in Texas as they do in New York. Conversely, Congress gave the states no role in making the legal and policy judgments whether and when interLATA authority is to be granted, but provided only that the Commission is to "consult" with state commissions to "verify" whether a BOC – as a factual matter – has "fully implemented" the uniform national requirements of the competitive checklist. As the Commission has elsewhere stated, it may choose to treat state commissions (like the Justice Department) as "expert witnesses" on these questions of fact (NY Order ¶ 51), but state commissions cannot receive deference on questions of law or of national policy.

In this regard, the TPUC has not engaged in any independent fact finding germane to the remaining issues before the Commission. First, although the TPUC previously established certain performance measures that allow data to be collected, it did not determine what SBC's actual performance has been, and the relevant facts are all undisputed. For example, as the TPUC observed, "[b]ecause SWBT and AT&T have reconciled the underlying [hot cut] data, ... all interested parties are given the opportunity to review the data and draw relevant conclusions

from that data.” TPUC II 17. The TPUC’s assessment of this undisputed data is thus not entitled to more weight than any other party’s assessment. Second, the TPUC’s evaluation of SBC’s hot cut performance was reached in consultation with SBC and was based on an SBC ex parte submission that was not publicly available until the eve of the filing of the TPUC’s evaluation. E.g., TPUC II 12 & n.48, 17. The fact that the TPUC did not afford AT&T or others an opportunity to review and comment on SBC’s ex parte submission before deciding to rely on it would preclude giving substantial weight to the TPUC’s comments even if they resolved disputed issues of fact – as they do not.

The TPUC also notes that it has made a “commitment in time and resources” to foster local competition by adopting performance standards, and it suggests that the Commission should defer to the TPUC’s recommendation for that reason. Otherwise, the TPUC claims, other states “will be reluctant” to make similar commitments and that their failure to do so will undermine implementation of the local competition provisions of the Act. TPUC II 4. However, quite apart from the fact that the Commission could readily establish the performance measures itself, it is the grant of this application that would undermine the objectives of the Act, for it would send precisely the wrong message to states. The message would be that so long as a state commission conducts collaborative proceedings and workshops to establish performance measures, its BOC will receive long distance authority, without regard to the adequacy of those measures or the BOC’s actual performance under them.

#### **I. SBC DISCRIMINATES AGAINST CLECS IN THE PROVISION OF ADVANCED SERVICES**

The comments confirm that SBC is discriminating against CLECs with respect to each of three strategies – providing advanced services with UNE-P, line sharing, and second loops – that CLECs seek to use to compete with SBC. Each strategy depends on CLECs receiving nondiscriminatory access to SBC’s unbundled network elements in order to provide the

telecommunications services that they seek to offer. Because SBC is not providing CLECs with that access, it fails to comply with section 251(c)(3), and cannot be found to have fully implemented its obligation to provide nondiscriminatory access to unbundled network elements. 47 U.S.C. §§ 271(c)(2)(B)(ii), (iv).

Although the TPUC “concludes that SWBT provides nondiscriminatory access to loops used by competitors to provide advanced services” (TPUC II 24), the TPUC’s analysis of advanced services does not withstand scrutiny. The TPUC overlooks numerous ways in which SBC is denying CLECs nondiscriminatory access to unbundled network elements in connection with the provision of advanced services.

**A. SBC Discriminates Against UNE-P CLECs**

The record confirms that SBC discriminates against UNE-P CLECs by denying them full use of the unbundled loop. See 47 U.S.C. §§ 153(29), 251(c)(3), 251(d)(2); 47 C.F.R. § 307(c); ALTS 10-11; AT&T 13-19. In particular, “[n]o CLEC that acquires a local loop through resale or as a UNE can itself provide voice over DSL, . . . nor can it . . . enter into an agreement with another CLEC to provide a DSL service over that loop.” ALTS 10. In addition, SBC refuses to permit UNE-P CLECs to provide voice alone to customers who receive SBC’s xDSL service. AT&T 17. “[T]he practical result is that SWBT and only SWBT is able to offer both services, an advantage compounded by the joint marketing already underway.” ALTS 11.

SBC’s refusal to provide access to all of the features, functions, and capabilities of the unbundled loop violates not only Rule 307(c) but SBC’s independent duty under § 251(c)(3) to provide nondiscriminatory access to unbundled network elements. AT&T 13-14. And SBC’s anticompetitive conduct is obstructing competition not just for advanced services but for residential voice services as well. Id. 11-12, 17-18. On this ground alone, SBC has not fully implemented its duty to provide nondiscriminatory access to unbundled network elements and the unbundled loop. § 271(c)(2)(B)(ii), (iv).

Nevertheless, nearly six months after the issue was first raised before it, the TPUC has again declined to explain how it has verified – in the face of this starkly illegal conduct – that SBC has fully implemented the competitive checklist. Moreover, the TPUC fails to acknowledge SBC’s abandonment of its stated position in its reply comments on the first application. AT&T 14-16. And the TPUC does not address the serious threat to UNE-P-based residential competition for voice services that SBC’s conduct now poses. Id. 17-18. Unlike the NY Order, where the Commission had at least issued an order condoning Bell Atlantic’s (unlawful) use restrictions, here there is no Order that purports to excuse SBC’s bald refusal to comply with the plain language of Rule 307(c) and of the Act. In short, there is no valid basis for either the TPUC or this Commission to fail to address SBC’s unlawful denial of access to the full capabilities of the unbundled loop.<sup>2</sup>

**B. SBC Discriminates In The Provision Of Line Sharing**

The TPUC also fails to address SBC’s ongoing and blatantly discriminatory conduct with respect to line sharing. As the comments reveal, SBC is discriminating today by refusing to provide line sharing today to any CLEC other than SBC’s own affiliate, ASI. Because SBC is denying CLECs access to a network element (the high frequency portion of the unbundled loop) that it is providing to ASI, SBC’s conduct violates section 251(c)(3) and demonstrates a failure to fully implement items (ii) and (iv) of the competitive checklist. In addition, the record makes clear that this discrimination will not abate anytime soon, because SBC is not taking the steps needed to make line sharing available on a meaningful basis to other CLECs by June 5, 2000.

---

<sup>2</sup> Because AT&T raised this issue in its comments on SBC’s first Texas application, SBC could “reasonably anticipate” that AT&T would again raise this issue. Ameritech Michigan ¶ 57. Under the Commission’s rules, SBC was obligated to address the issue in its initial comments (and it would have been helpful for the TPUC to have done so as well), to permit interested parties an opportunity to comment. See id. Should SBC or the TPUC address this issue in reply, AT&T respectfully requests that the Commission either accord the response no weight or permit AT&T an opportunity to respond.

**1. SBC Discriminates By Providing Line Sharing Only To ASI**

The TPUC ignores SBC's "patently discriminatory provision of line sharing to ASI before line sharing is available to unaffiliated CLECs . . . ." Sprint 21; see @Link 10; AT&T 19-21; Rhythms 17-18. The simple fact is that, while many CLECs today wish to have access to line sharing, the only carrier that has such access is SBC's affiliate, ASI. E.g., Rhythms 7-8; Cruz Supp. Aff. ¶ 17. There is thus "no basis for the Commission to conclude that the nondiscrimination requirement of Section 271 has been satisfied." Rhythms 17-18.

The fact that SBC's merger conditions do not bar line sharing with ASI is beside the point. As the comments confirm, "[c]ompliance with the merger conditions is not equivalent to complying with Section 271." @Link 10. Indeed, "any attempt to rely on conditions imposed in the SBC-Ameritech Order is contrary to the language of that decision, which states that the conditions "address potential public interest harms specific to the merger . . . not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services market.' SBC/Ameritech Merger Order ¶ 357." Sprint 21. Indeed, none of SBC's purported justifications for discriminating on behalf of ASI has merit. See AT&T 19-21. This conduct alone constitutes a failure to fully implement the competitive checklist. § 271(c)(2)(B)(ii), (iv).

**2. SBC Will Not Implement The Line Sharing Order On Time**

The TPUC's endorsement of SBC's conduct with respect to line sharing rests entirely on its uncritical acceptance of SBC's "plans to have line sharing implemented in Texas by May 29, 2000 . . . ." TPUC II 36. The TPUC states that SBC has been "aggressively rolling out testing procedures"; that CLECs who "disagree with SWBT's interpretation of the Line Sharing Order" or with SBC's proposed rates "may negotiate different terms and conditions" or "choose to arbitrate disputed items"; and that SBC will make available "two options regarding ownership of the splitter" by the required implementation date. Id. On this basis, the TPUC concludes that CLECs will enjoy nondiscriminatory access to line sharing by June 5, 2000, the date compliance

with the Line Sharing Order is required.

The comments of CLECs make clear, however, that none of these assumptions is correct. Indeed, the record is clear that SBC has taken many steps – not addressed by the TPUC’s Comments – to ensure that CLECs will not have access on June 5, 2000, or anytime soon thereafter, to the line sharing to which they are entitled under this Commission’s order. The CLECs’ comments demonstrate beyond dispute that SBC’s current discrimination provision of line sharing to ASI will continue far beyond June 5, 2000, or even by July 2.

First, neither of the “two options” for owning the splitter will be fully available to CLECs by June 5. One option, involving a CLEC-owned splitter, is for at least some CLECs “the least desirable configuration for line sharing.” See NorthPoint, Lewandowski Aff. ¶ 25. SBC has recently expressed doubt to CLECs about whether it will be able to make this option available by June 5 (see id. ¶ 26), and is planning to impose such “extremely unreasonable conditions and lengthy provisioning intervals” on the availability of line sharing with CLEC-owned splitters as to “prevent timely, scaleable entry by June 6<sup>th</sup>.” Rhythms 4; see id. 4-6; Lopez Aff. ¶¶ 11-14. As to the preferred option, involving SBC-owned splitters, SBC has now published a revised implementation schedule that calls for only “one-sixth of SBC’s central offices to be ready for line sharing by June 6” (Rhythms 6) and that “will not complete line sharing implementation until the end of August 2000.” NorthPoint 9; see id. Lewandowski Aff. ¶ 27 & Att. A (SBC’s deployment schedule for SBC-owned splitters). Thus, neither line-sharing option will be fully available to CLECs by June 5<sup>th</sup>.

Second, SBC “also has been unwilling to engage in meaningful negotiations with CLECs concerning line sharing.” Rhythms 7. SBC delayed responding to competitors’ requests for line-sharing negotiations for over four months, then set forth a take-it or leave-it proposal that “lacks any credible ‘good faith’” because it is “unreasonable and inconsistent with the Line Sharing Order on many points,” id. 7-8, and because it insists on non-cost based rates. See Covad,

Goodpastor Supp. Decl. ¶¶ 17, 18. SBC also unilaterally “withdr[e]w its agreement to enter into interim line sharing arrangements with competitive LECs” (NorthPoint 8), even though CLECs wanted such arrangements (id.) and this Commission previously found that “there may be interim measures” that ILECs could take to make line sharing available to CLECs before June 6, 2000. Line Sharing Order ¶ 161.

The TPUC’s optimism about CLECs’ ability to negotiate reasonable line sharing terms with SBC and use line sharing to enter the market by June 6<sup>th</sup> is thus wholly unfounded. To the contrary, “competitive LECs are forced to either take SWBT’s unilateral, one-sided (and roundly unacceptable) contract proposal or delay their market entry until arbitration is complete, which could be as much as four or five months from the date an arbitration request is filed.” NorthPoint 8; see Rhythms 9 (SBC prohibits linesharing on fiber-fed loops); Covad 9 (same). In short, the record demonstrates that SBC “is not implementing line sharing in good faith.” Id. 3.

These facts also preclude approval of SBC’s 271 application. SBC’s obligation not to discriminate against CLECs in the provision of line sharing is statutorily based and effective today. See AT&T 19-20.<sup>3</sup> And the evidence does not support a finding that this discrimination will end anytime soon. This Commission previously found that “any delay in the provision of the high frequency portion of the loop will have a significant adverse impact on competition in the provision of advanced services.” Line Sharing Order ¶ 161. The delays that SBC is causing today with respect to line sharing preclude any finding that SBC has fully implemented its duties under the competitive checklist. And of course, even if SBC eventually does permit line-sharing,

---

<sup>3</sup> SBC also is incorrect in claiming that it cannot be held accountable in this application for failing to implement its duties with respect to the Line Sharing Order itself. At a minimum, SBC must provide a factual basis sufficient to support a finding that it will comply, which it has not done. Moreover, SBC’s assertion is inconsistent with SBC’s simultaneous insistence that the Commission give weight to SBC’s post-application performance data. If SBC may submit post-application data to demonstrate compliance with pre-application duties, then it ought to demonstrate compliance with post-application duties as well.

that will simply mean that the only carriers who could challenge SBC's voice monopoly – the UNE-P CLECs – will still be foreclosed from achieving the same single-line efficiencies available to SBC, its affiliate, and the data CLECs. See AT&T 16-17.

### **C. SBC Discriminates In The Provision Of Second Loops**

Aside from two brief paragraphs on line sharing, the TPUC devotes all of its comments on advanced services to CLEC access to second loops. Throughout those comments, the TPUC repeatedly excuses what the DOJ has found to be quite evidently discriminatory performance based on promised improvements that the CLECs' comments pervasively show have not been met.<sup>4</sup> SBC's poor performance is particularly apparent in two respects.

#### **1. Provisioning Discrimination**

First, the TPUC fails to explain why SBC's documented discriminatory performance in two important provisioning areas – missed installation (or “due”) dates and trouble reports – is consistent with full implementation of the checklist.<sup>5</sup> With respect to missed due dates, SBC's performance over the past six months has been consistently poor – indeed, that performance worsened steadily each month between October and February, and improved for the first time only in March. See TPUC II 30 (Table summarizing PM 58). Although the TPUC labels this one month of self-reported data – data that was not part of SBC's initial application – a “trend”

---

<sup>4</sup> See, e.g., NorthPoint at 5 (DSL process improvements), 9 (OSS changes for preordering and ordering); Rhythms at 14-15 (lack of employee training on cooperative loop acceptance testing), 16 (fixes for EDI and Datagate but not Lex and Verigate); Sprint at 8 n.6 (ordering processes), 23 (real-time access to loop make-up info), 24 (spectrum), 24 (firewall to protect CLEC confidential data); Covad at 7 (OSS changes to enable access to loop make-up info), 12-13 (ordering processes), 13-14 (spectrum management), 15-16 (loop make-up) 16 (firewall); @Link at 18 (loop make up).

<sup>5</sup> The TPUC also fails adequately to explain why SBC's “manual ordering process for DSL loops” provides nondiscriminatory access. NorthPoint 4; see Covad 2, 3. The TPUC's assessment is further undercut by the CLECs' demonstration, in a complaint recently filed with this Commission, that SBC “acted in bad faith” in failing fully to implement the improvements to DSL pre-ordering and ordering required by SBC's Plan of Record. See NorthPoint 10-12.

(id.) that it expects will continue, the far more telling point is that SBC's average performance for the last 6 months shows gross non-compliance in the face of increasing volumes. Id.

The TPUC then points to the anticipated availability of line sharing as grounds for improved on-time performance. Id. As noted above, however, the comments make clear that line sharing is not available to CLECs now and will not be fully available to CLECs even by the June 6, 2000, the effective date of the Line Sharing Order.

The TPUC also suggests that PM 58 (for missed due dates) is mis-defined, and that SBC's performance would look much better if the principal reason for missed due dates – a lack of facilities – was eliminated. TPUC II 30-31. This is unreasonable, because the ground for overlooking this problem (the presumed availability of line sharing) is unwarranted, because CLECs will continue to need access to second loops even after line sharing is made available. See, e.g., @Link 10-11; NorthPoint 12; Sprint 22. Moreover, SBC's claimed "lack of facilities" in fact reflects only a failure to dedicate the personnel and resources needed to provision second loops on time. See Sprint 13-17; @Link 13-15; AT&T 23 n.28.

As for troubles on CLEC lines (the second basic area of discriminatory provisioning), the TPUC seeks to excuse SBC's "non-compliant" performance by noting that SBC "has shown steady improvement." TPUC II 33. But the data show that SBC has simply moved from terrible to bad – they do not show non-discriminatory performance at any time, including March. Id. Although the TPUC suggests that future changes to the definition of the performance standard (e.g., to exclude instances "when CLECs use xDSL capable loops beyond the allowable parameters of the loop") may help SBC show improved performance, it fails to quantify the impact that such changes would have. And the TPUC offers no analysis as to why those changes would be warranted in the first place; as the CLECs demonstrate, they are not. See, e.g., @Link 15-16 (CLECs have no incentive to request, and are not requesting, "untested technologies"); see also Sprint 18-19; AT&T 22-23.

## **2. Unreconciled, Unreliable Data**

The TPUC accepts all of SBC's self-reported data at face value. But the record shows serious reason to question the validity of those data. Despite a longstanding request, until the week comments on this application were due, SBC "has refused to work with NorthPoint to reconcile data." NorthPoint 6 & Lewandowski Aff. ¶ 12. This refusal stands in stark contrast to Bell Atlantic's "daily, order-by-order review of NorthPoint's loop orders" (NorthPoint 3 n.4), and alone creates substantial doubt about the accuracy of SBC's reported performance.

Indeed, with respect to on-time performance, there is evidence that SBC's ordering and provisioning performance is substantially worse than SBC is now reporting. SBC requires CLECs to supplement their DSL loop orders when SBC's own customer service representative has erroneously (and manually) rejected the order, and when SBC has belatedly discovered "that a loop requires de-conditioning." NorthPoint 5 & Lewandowski Aff. ¶¶ 14, 16. As a result of these SBC-caused supplements, CLECs must incur the cost and delay of submitting a second order, yet SBC gets to take credit for having processed the entire order "on-time." NorthPoint 5-6. Thus, SBC's on-time performance – which is already non-compliant – is in reality almost certainly far worse than SBC has reported.

### **D. SBC's Project Pronto Architecture Is Discriminatory**

The TPUC also overlooks a fundamental aspect of SBC's discrimination with respect to advanced services. SBC is moving rapidly to implement a new network architecture to support Project Pronto that is specifically designed to favor ASI's business plan and disadvantage all other competitors. As the comments make clear, this strategy will harm all three CLEC strategies for competing with SBC, and leave consumers with far fewer choices and far less innovation in advanced services than a competitive market would provide.

The comments confirm that SBC has designed Project Pronto to support "a rapid rollout of ADSL service throughout its region." @Link 20; see AT&T 11-12. SBC has already

confirmed that collocation at the remote terminals integral to the Project Pronto architecture will be scarce, and alternate copper facilities will not always be available. Id. 24. Yet SBC has failed to establish any terms, conditions, or procedures for ensuring that CLECs will have access to equipped loops as required by the UNE Remand Order ¶ 69. See AT&T 24; Pfau/Chambers Supp. Decl. ¶¶ 60-69. In addition, SBC intends to use Project Pronto to favor the business plan of ASI and obstruct CLECs who seek to provide “different – and better – DSL services than ADSL.” @Link 20; see id. 20-22; ALTS 7.

At least one state commission has already voiced its “concerns about the ramifications” of SBC’s Project Pronto architecture. CPUC DSL Ex Parte 2 (Attachment 1, hereto). In comments filed in connection with SBC/Ameritech license transfer proceedings (CC Docket No. 98-141), the California Public Utilities Commission observed “that SBC’s proposed technology may prevent competitors from offering forms of DSL service other than ADSL and value added services such as Centrex services and video on demand, among other services. Moreover, California is concerned that competitors may be precluded from deploying innovative technologies that are not compatible with the technology selected by SBC.” CPUC DSL Ex Parte 2. The CPUC is also concerned about the impact of SBC’s expanded deployment of DLC on the ability of competitors to use “their own switches” to compete with SBC. Id. 2-3.

In sum, although the TPUC is silent on this issue, the record demonstrates that SBC is literally building into its network an architecture that – absent modifications and implementation of procedures such as access to equipped loops – SBC can use systemically to delay, hamper, and exclude competitors. This is yet another reason why SBC has not fully implemented its checklist obligations with respect to CLEC access to network elements for provision of advanced services.

**E. SBC’s Data Affiliate Does Not Cure SBC’s Discrimination**

Notably, the TPUC does not attempt to defend SBC’s DSL provisioning on the ground that SBC can show its compliance with section 271 merely by establishing a separate affiliate.

As the comments of numerous CLECs make clear, “the mere presence of a fully operational affiliate, by itself, is no guarantee that the BOC’s conduct is non-discriminatory.” ALTS 6 n.18; see AT&T 24-26; @Link 7-9; Sprint 19.

Indeed, the only guarantee is that ASI, SBC’s data affiliate, has rampant opportunities to gain unfair advantages over other DSL providers. That is because the merger conditions pursuant to which ASI was created include numerous provisions that allow SBC to discriminate in favor of its affiliate. See AT&T 64-70; IP Comm., Minter Supp. Decl. ¶¶ 8-11; @Link 10, Sprint 19-22. An affiliate created under those nominal separation requirements will inevitably and unfairly benefit from preferential treatment that the incumbent LEC has such a powerful incentive to bestow.

SBC has not provided any evidence that its implementation of the merger conditions has reduced these opportunities for discrimination.<sup>6</sup> To the contrary, the record shows a clear and consistent pattern of discrimination in favor of ASI, including bias in network design,<sup>7</sup> exclusive access to line sharing,<sup>8</sup> OSS design,<sup>9</sup> provisioning and maintenance of DSL-capable loops,<sup>10</sup> and

---

<sup>6</sup> Notably, the merger conditions expressly contemplate that SBC could have created its affiliate pursuant to “a more stringent structural separation model than that outlined in the conditions.” SBC-Ameritech Order ¶ 458. Even SBC does not claim that it has done more than the bare minimum required by the conditions. SBC’s only “evidence” of nondiscrimination consists of promises that ASI will operate separately, e.g., @Link 8, which cannot be credited in a section 271 application and which, in all events, have yet to generate any firm data that could possibly support SBC’s claims that all advanced services providers will be treated equally. See, e.g., DOJ 3/20 Ex Parte 5-8; NorthPoint 13; @Link 7-9; CCCTX 8-10.

<sup>7</sup> See supra Part I.D; ALTS 6-9; @Link 20-22; CompTel 5-7; IP Comm., Minter Supp. Decl. ¶ 8.

<sup>8</sup> E.g., @Link 10; NorthPoint 13; see also DOJ 3/20 Ex Parte 7 (ASI’s exclusive access to “SBC network planning and engineering, ... confers a significant competitive advantage on ASI, particularly in negotiating for collocation space, a scarce and valuable resource”).

<sup>9</sup> E.g., IP Comm., Minter Supp. Decl. ¶ 9; 3/20 Ex Parte 6-7; NorthPoint 12.

<sup>10</sup> Sprint 20; AT&T 69-70; DOJ 3/20 Ex Parte 7-8.

joint marketing and customer care.<sup>11</sup>

It is precisely this pattern of discriminatory conduct that further reinforces the conclusion that ASI must be deemed a successor or assign to SBC, and therefore subject to all of the obligations of an incumbent LEC. The Commission has determined that it will find a successor relationship where there is “substantial continuity” between an incumbent LEC and its data affiliate. SBC-Ameritech Order ¶ 454. Here, that continuity is clearly established by SBC’s transfer to ASI of extensive and significant assets so that ASI could continue SBC’s existing DSL business without substantial change or interruption. See AT&T Supp. 64-70. And now that there is post-formation evidence of the numerous unfair advantages that ASI gains from its affiliation with SBC, it is more clear than ever that there is substantial continuity, and therefore successorship, between SBC and ASI. See SBC-Ameritech Order ¶ 457 (a successor-assign relationship arises when an affiliate’s “operations become too intertwined with the incumbent;” otherwise, the incumbent would frustrate the “pro-competitive purposes of section 251” and could “evade its obligations under 251(c)”).<sup>12</sup>

SBC’s consistently preferential treatment of ASI thus highlights SBC’s complete failure to comply with its checklist obligations to provide access to network elements for advanced services on a nondiscriminatory basis.

## **II. SBC IS NOT PROVIDING NONDISCRIMINATORY ACCESS TO HOT CUT LOOPS**

The record also clearly shows that SBC has failed to meet its obligations with respect to

---

<sup>11</sup> E.g., @Link 10; IP Comm., Minter Decl. ¶ 10.

<sup>12</sup> Additional evidence of the “lack of an independent relationship between SWBT and ASI” (ALTS 9 n.24) came at DSL workshops sponsored by the Texas PUC, where “not a single ASI representative” attended, and where “[a]ll of the decisions and commitments on behalf of ASI were being made by SWBT legal counsel and SWBT regulatory personnel.” Id.; see IP Comm., Minter Supp. Decl. ¶ 8.

hot cut loops. As the DOJ points out, the record that SBC relied upon in its April 5 application “was not substantially different from the record available in Texas I at the time the Department filed its March 20, 2000 ex parte submission.” DOJ II 3. Numerous CLECs have joined AT&T in identifying the many respects in which SBC’s performance fall far short of the standard that this Commission deemed “minimally acceptable” in the NY Order.<sup>13</sup>

Once again, the TPUC disagrees, claiming that SBC’s hot cut provisioning offers competitors “a meaningful opportunity to compete in the local exchange market.” TPUC II 14. But although the TPUC purports to apply the standards that this Commission relied upon in the NY Order, in reality, the TPUC does no such thing. When the reconciled data on AT&T’s hot cut orders presented here are examined in a straightforward manner against the standards applied to the reconciled data on AT&T’s hot cut orders at issue in the NY Order, it is obvious that SBC’s hot cut performance is significantly worse than Bell Atlantic’s.

**A. SBC Causes Significantly More Outages Than Did Bell Atlantic**

The Commission approved Bell Atlantic’s 271 application based, in part, on its finding that Bell Atlantic caused outages on “fewer than 5 percent” of AT&T’s hot cut orders that Bell Atlantic processed during the three-month period on which Bell Atlantic relied in its initial application. NY Order ¶ 309. By contrast, SBC caused outages on 16.7% of AT&T’s orders during the three-month period that SBC relied upon in its April 5 letter application. See AT&T 28-31. SBC’s performance during this most recent three-month period (December 1999-February 2000) was thus substantially worse than Bell Atlantic’s performance. Indeed, SBC’s performance deteriorated significantly from the three-month period at issue in Texas I, where DOJ concluded that SBC’s reconciled outage rate of 8.2% on AT&T’s orders was substantially too high to meet the BA-NY standard. See DOJ I 33.

---

<sup>13</sup> E.g., AT&T 26-39; ALTS 2-5; Allegiance 6-9; @Link 2-6; CCTX 2-7; RCN 3-11.

There is only one material respect in which the reconciled AT&T/SBC outage data here differs from the AT&T/BA-NY outage data that the NYPSC reconciled. Unfortunately for SBC, this difference causes the reconciled data to understate the number of outages that SBC has caused. When AT&T's and SBC's representatives reconcile outage data, they exclude from their list all outages that SBC caused but that SBC also reported as a "trouble" under PM 59 and PM 65. See DeYoung/Van de Water Supp. Reply Decl. ¶¶ 86-90. Conversely, when the NYPSC reconciled AT&T's and BA-NY's outages data, the NYPSC included those outages that Bell Atlantic separately reported as a trouble under PR-602, the comparable New York measure of troubles. See id. ¶¶ 87-89 & Att. 5, 13. By excluding the outages captured in SBC's trouble reports, the AT&T/SBC reconciliation significantly understates the number of SBC-caused outages as compared to Bell Atlantic's performance. See id.

Based on its work with SBC, the TPUC states that the figure that most aptly characterizes SBC's outage rate is "1.68%." TPUC II 18. The TPUC adopted this figure from an ex parte submission that SBC filed the day before the TPUC's (and other parties) comments were due, and from prior contacts between TPUC staff and SBC concerning SBC's unilateral "refinement" of the jointly reconciled data. Id. 14, 18. The TPUC never asked AT&T to comment on this refinement before the TPUC filed its comments. DeYoung/Van de Water Supp. Reply Decl. ¶ 13. The TPUC also never asked whether AT&T would recommend any adjustments to the reconciled data. Id. Because the TPUC reached its judgment about how to "refine" the reconciled data without the benefit of AT&T's (or other CLECs') comments, its analysis cannot be presumed to reflect any implicit rejection or resolution of objections to that analysis. Instead, the TPUC's analysis reflects only its uncritical acceptance of SBC's adjustments to the reconciled data.

SBC (and the TPUC) derive a 1.68% outage rate by making a series of assumptions, each of which departs sharply from the standards and methodology applied in New York. None of these departures has merit. As discussed below, each serves to overstate SBC's performance

as compared to Bell Atlantic's, and to obscure or misrepresent the degree to which SBC's performance fails to meet the standard deemed "minimally acceptable" in the NY Order.

At the outset, however, it is important to highlight the significant anticompetitive consequences that would follow if the Commission were to relax its minimum standard for hot cut outages, as the TPUC now requests. As the DOJ noted in its BA-NY evaluation, surveys show that "[t]he strongest impediment to switching [LECs] comes from concern about service interruptions during the change over."<sup>14</sup> That is fully consistent with AT&T's own experience. See Dapkiewicz Supp. Reply Decl. As a result, this Commission rightly concluded that any evidence that a BOC was suggesting to consumers that there was even "a possibility of service disruptions" would itself be competitively significant. NY Order ¶ 309.

Nevertheless, the Commission set a very generous minimum standard for outages. AT&T, for example, estimates that the small-to-mid size business market in Texas could support AT&T orders at a volume of 1,000 orders per day. See DeYoung/Van de Water Supp. Decl. ¶ 17. Under the Commission's minimum standard, SBC would be permitted to cause outages on up to 5 percent – or 50 AT&T customers – each day – or about 1,000 outages per month for AT&T customers alone. Id. The adverse publicity that would accompany such widespread service outages, the chilling effect of such publicity on the willingness of customers to switch carriers, and the damage to AT&T's reputation as a carrier that provides the highest quality of telecommunications service, would all be extraordinary. Dapkiewicz Supp. Reply Decl. ¶¶ 14-26. Thus, enforcement of the Commission's minimum standard would produce an unacceptably high number of outages that would itself preclude meaningful competition using unbundled hot

---

<sup>14</sup> DOJ NY Eval. 18 n.39 (quoting Competition Policy Institute Comments, Att. A, at 11).

cut loops. DeYoung/Van de Water Supp. Decl. ¶ 17.<sup>15</sup>

Were the Commission to decide in this proceeding, however, to dilute the outage standard further, that decision would effectively preclude CLECs from using unbundled hot cut loops in any significant volumes. The TPUC has provided no factual basis to support taking such a step, and there is none. For example, there is no evidence that service outages in Texas last only a few minutes – to the contrary, the average duration of SBC's CHC outages (beyond the 1 hour of outage time already permitted SBC in the cutover process) was 6.49 hours, and the average duration of its FDT outages was 8.42 hours. DeYoung/Van de Water Supp. Reply Decl. ¶ 30. SBC is thus causing AT&T's new customers to lose service on average for an entire business day.

There also is no evidence that customers in Texas are more forgiving of such service outages when they switch carriers than customers in New York. To the contrary, the only evidence in the record on customer impact confirms that service outages of even 2 and ½ hours have resulted in lost business opportunities and lost revenue for the business customers victimized by them. See Dapkiewicz Supp. Reply Decl. ¶¶ 16-21 & Atts.1-3. In short, there is no factual basis on which this Commission could conclude that competition in Texas will thrive with a level of service outages that the Commission deemed intolerable in New York.

The Commission should therefore scrutinize each of the steps that SBC took to reduce the reconciled outage rate from 16.7% to 1.68%. Each represents not a factual – but a methodological – adjustment that effectively weakens the outage standard adopted in New York. None should be followed here.

---

<sup>15</sup> That is why AT&T has again urged the Commission to require incumbent LECs to achieve the fewest number of hot cuts that is technically feasible and commercially reasonable, a standard that is truly “a proxy for whether access is being provided in substantially the same time and manner and, thus, [is] nondiscriminatory.” NY Order ¶ 45; see AT&T 28 n.34.

**1. SBC Should Be Held Accountable For Its FDT Outages**

SBC's 16.7% outage rate includes the outages that SBC caused on both AT&T's FDT and CHC orders.<sup>16</sup> But SBC's outage rate on FDT orders alone (20.8%) was worse than on CHC alone (11.1%). See AT&T 30. Even applying all of SBC's other "refinements," SBC was able to whittle the FDT outage rate down only to 14.25% -- a level that the TPUC does not attempt to defend as nondiscriminatory. See TPUC II 22-23.

SBC's first step is to exclude from consideration its abysmal FDT performance. Id. 14-15. This is improper. SBC has consistently represented FDT to be SBC's preferred provisioning process for typical hot cut orders. SBC has encouraged CLECs to send FDT rather than CHC orders, and created financial penalties (unsupported by any forward-looking cost study) to reinforce use of FDT. And whenever CLECs have suffered poor results with FDT, SBC has assured them that the process has been fixed and urged them to resume sending FDT orders. Consequently, during the three-month period on which SBC relies, AT&T, like other CLECs, submitted more FDT than CHC orders.

In short, at SBC's design and urging, FDT was the principal hot cut process used during the relevant time period, and the supplementary charges for CHC have never been proven to be cost-based. If the Commission had to pick just one hot cut provisioning process to evaluate (which it does not), the obvious choice would be FDT. None of the TPUC's professed reasons for ignoring FDT has merit.

First, the TPUC claims (p. 14) that "the CHC process has been in effect for a long period

---

<sup>16</sup> Although the Commission should not consider March performance data, in the event it does, SBC's outage rate would not materially change if the period considered is January through March rather than December through February. See DeYoung/Van de Water Supp. Reply Decl. ¶ 11. It should be noted, however, that the reconciled number of outages for March exclude two orders that, under the Commission's evidentiary rules assigning the burden of proof to SBC, should be counted as SBC-caused outages See id.

of time; FDT by contrast is a new process.” This is not true. Both CHC and FDT have been “in effect” since work begin in earnest on the hot cut process. Indeed, SBC’s own written submissions to and oral testimony before the TPUC clearly show that SBC has always presented FDT as the principal method for provisioning hot cuts, and CHC as an alternate method to be used only for those relatively rare orders involving a large number of loops or a provisioning time outside normal business hours. DeYoung/Van de Water Supp. Rep. Decl. ¶¶ 23-26 & Att. 6.

Although CLECs initially sent most orders via CHC rather than FDT, SBC consistently urged CLECs to switch over to FDT. For example, SBC “encourage[d]” AT&T to use FDT in July 1999, claiming that FDT would help address problems that AT&T had with CHC orders. See DeYoung Decl. ¶ 45 & Att. 2. After a trial of the FDT process last August, SBC repeated its recommendation that CLECs use FDT instead of CHC, explaining that use of FDT would “alleviate[]” the capacity constraints of CHC. Id. ¶¶ 45-47, Att. 4, 5. These capacity constraints continue to be a problem. See DeYoung/Van de Water Supp. Reply Decl. ¶ 71 (describing SBC’s rejection of AT&T’s May CHC orders because it could not provision them on the requested due date).

In addition, SBC unequivocally endorsed FDT as the principal process for hot cuts in the affidavit it submitted on hot cuts with its first application in January. See Conway Aff. ¶¶ 79, 86. SBC also structured its charges to provide a significant financial penalty -- \$115 per line -- for any CLEC who asked for CHC provisioning on an order for fewer than 20 lines. Although SBC is not now collecting this penalty, its existence and SBC’s ability to begin charging it whenever it decides to do so makes crystal clear both SBC’s intent to reserve CHC for high-volume orders and CLEC’s strong incentive to use FDT lest their competitors gain a significant cost advantage when CHC charges are imposed. DeYoung/Van de Water Supp. Reply Decl. ¶¶ 27-29. Indeed, the additional cost that SBC threatens to impose on CHC orders would so greatly increase a CLECs’ provisioning costs as to make CHC in most instances an economically impracticable

option. Id.

As a result of SBC's consistent encouragement and incentives, both AT&T and CLECs collectively sent more FDT than CHC orders to SBC during the December-to-February period. As provisioning problems arose once again with FDT, SBC not only promised to fix them, it claimed in its renewed 271 application that it had fixed them, and that "reliable, timely, and outage-free service can be expected" with FDT as well as CHC. Conway/Dysart Supp. Aff. ¶ 34. When CLECs inquired at a user forum on April 6, 2000, whether SBC really still endorsed FDT as the principal process to use for typical hot cut orders, SBC confirmed to CLECs that FDT is "the way to go." See DeYoung/Van de Water Supp. Aff. ¶ 23 n. 9 & Att. E. At AT&T's request, SBC then wrote to AT&T to confirm this representation and to "encourage [AT&T's] use of the FDT process." See id. Att.D.

Thus, nothing in the record supports the TPUC's dismissal of FDT as a "new" or marginal process. To the contrary, the record shows overwhelmingly and without contradiction that SBC has consistently portrayed FDT as the preferred hot cut process for most hot cut orders, that SBC never provided forward-looking cost-basis for its CHC charges but designed them to discourage use of CHC for most hot cut orders, and that CLECs have heavily used FDT – in direct reliance on SBC's entreaties – throughout the time period most relevant to this application.

Second, the TPUC states (at 14) that FDT should be disregarded because "Bell Atlantic did not have an FDT process in place at the time of its application so the FCC did not evaluate FDT data." This explanation is a non-sequitur. Bell Atlantic did not have in place the CHC process, either. Bell Atlantic had one process that had elements of both FDT and CHC and that it consistently stated was not capacity-controlled, see DeYoung/Van de Water Supp. Reply Decl. ¶ 31, and the NYPSC and this Commission considered all of AT&T's hot cut orders during the relevant time period. The Commission should do the same here, particularly since the process the TPUC seeks to have this Commission ignore is the same one that SBC has consistently

avored and encouraged CLECs to use.<sup>17</sup>

Finally, the TPUC claims (at 14) that to evaluate SBC's FDT performance "will discourage other RBOCs from developing new systems or processes, even if such systems or processes may ultimately be more efficient, just before or during the pendency of their 271 applications." The TPUC's concerns are wholly misplaced, however, because they mistakenly assume that FDT is "new." If FDT truly were a new, innovative process being offered only a trial basis, CLECs would have kept their FDT volumes very small, as AT&T did last August. Instead, SBC has consistently designated its FDT process as "the way to go." See DeYoung/Van de Water Supp. Reply Decl. ¶ 30. To overlook SBC's poor FDT performance in these circumstances would be to countenance a regulatory bait and switch. It would encourage RBOCs to induce heavy use of provisioning processes that they later intend to argue should be immune from regulatory scrutiny. And it would signal unmistakably that RBOCs can ignore their commitments to make their provisioning process "reliable, timely, and outage-free" (Conway/Dysart Supp. Aff. ¶ 34) and still gain § 271 authorization.

In sum, the TPUC has provided no persuasive reason for ignoring SBC's principal provisioning process for hot cut orders. To do so would exclude the lion's share of hot cut orders from regulatory scrutiny.

## **2. SBC Should Be Held Accountable For Early Cutovers**

Even if FDT orders are excluded from consideration, SBC's reconciled outage rate stands at 11.1%, more than twice the rate that Bell Atlantic achieved. SBC was therefore compelled to take a second step to reduce the rate even further. It backed out from the number of reconciled

---

<sup>17</sup> The TPUC also states (p. 14) that it is not yet satisfied that the measurements it set for CHC should be employed without change for FDT. But this does not justify overlooking the reconciled outage data for FDT orders. That data is ready-to-hand now, and it measures SBC's outage performance in a manner that permits a direct comparison to Bell Atlantic.

outages those “outages that result from premature disconnects.” TPUC II 17. The exclusion of these outages is unexplained and unsupportable.

An outage caused by a premature disconnect (or “early cut”) is an outage in every sense. From a customer’s perspective, what matters is the fact of the service disruption – not its cause. And prematurely disconnecting a customer’s lines causes a service disruption just as surely as misattaching the wires. Thus, the Commission included outages due to early cutovers in its calculation of Bell Atlantic’s outage rate. See NY Order ¶ 301 n.959 (explaining that “outages can occur in two situations,” namely “an early cut” and “a defective cut.”); see NYPSC Reply Eval., Rubino Aff. ¶ 13 & Ex. 5, 6 (showing “early cuts” were included as outages in the NYPSC staff reconciliation), attached to DeYoung/Van de Water Supp. Reply Decl. ¶ 88 Att. 5.

The TPUC identifies no facts, much less facts unique to Texas, that warrant the exclusion of outages caused by premature disconnects. To the extent the TPUC’s concern was one of “double counting” premature disconnects for both outages and on-time percentage, that concern is misplaced in light of the NY Order. Indeed, as the FCC expressly noted, a premature disconnect was captured as both an outage and a “miss” in on-time performance in assessing Bell Atlantic’s performance. See, e.g., NY Order ¶ 301 n.959 (“Such an occurrence [an early cut] would be scored as a ‘miss’ under the Percent On-Time Hot Cut Performance Measure *and would also result in an outage*”) (emphasis added). Thus, the Commission’s adoption of a “fewer than 5 percent” minimum outage standard presumed that outages would include outages caused by early cutovers. If early cuts are to be excluded, then the fewer-than-5-percent standard must be substantially tightened up to reflect that change.

In tacit acknowledgment that its exclusion of early cutovers is indefensible, the TPUC purports later to “consider[] the outage data together with the premature disconnect data.” TPUC II 19. But it does not do so. Having “backed out” the premature disconnects from the reconciled AT&T/SWBT data, the obvious next step would have been to put those data on premature

disconnects back in, and discuss the reconciled results just as they were originally reported by SBC's and AT&T's representatives. But that step would lead right back to SBC's indefensible 11.1% CHC outage rate.

Avoiding that result, the TPUC shifts gears to address (p. 18) not the reconciled AT&T data on outages due to premature disconnects, but the data for "all CLECs" on premature disconnects, as ostensibly reflected in SBC's latest and largely self-reported results under PM 114. This self-reported outage rate for premature disconnects is not a fair substitute for the reconciled AT&T data. That is because AT&T's reconciliation demonstrates that SBC consistently under-reported its outages caused by premature disconnects throughout the December through February period, even though there was evidence in SBC's own raw data to show that such an early cut took place. See DeYoung/Van de Water Supp. Reply Decl. ¶¶ 46-49. The TPUC does not acknowledge this underreporting, and it does not adjust the rate of premature disconnects to reflect SBC's likely underreporting of premature disconnects for the rest of the industry.

In short, where, as here, the parties have provided the Commission with a single, consistent, reconciled data set on outages that is comparable in relevant respects to the data set considered in the NY Order, there is no reason to abandon that data set in favor of a "mix and match" of other data that has not been reconciled. The TPUC's decision to back out those AT&T orders on which SBC caused an outage with an early cutover (without also adjusting the fewer-than-5-percent standard) is inexcusable, and the TPUC's failure to put those orders back into the equation is equally arbitrary.

### **3. SBC Should Be Held Accountable For Outages Caused By Its Flawed Software**

The third step taken to reach the 1.68% outage rate for CHC cutovers was to exclude the outages that SBC caused on numerous AT&T orders in February due to a software error in SBC's

SOAC/RCMAC systems. The TPUC defends this adjustment based on its belief “that this problem has been rectified and will not affect SWBT’s future performance.” TPUC II 18. But even if the TPUC’s belief proves to be true, that would not excuse SBC’s poor performance.

A BOC applicant can always claim that it had “fixed” whatever particular problem has led to the discriminatory performance that immediately preceded its application. But that does not mean that other disruptive one-time problems will not occur.<sup>18</sup> As TPUC Chairman Wood recently acknowledged, “everything you do to fix a problem has a downstream impact that may impact another side of the service.”<sup>19</sup> It is thus crucial to broad-based, meaningful competition that a BOC put in place stable systems and processes that anticipate potential adverse impacts on CLECs from inevitable systems changes, and that prevent such disasters from occurring in the first place. See DeYoung/Van de Water Supp. Reply Decl. ¶¶ 56-57. A BOC that has not yet been able to provide non-discriminatory access, free of such one-time systems errors, for at least three consecutive months, has simply not demonstrated that its systems are ready to support meaningful competition.

SBC’s consistently erratic performance vividly illustrates the point. SBC has repeatedly invoked the excuse of “one-time error” to justify, after-the-fact, why it should not be held responsible for its plainly discriminatory performance. See id. 58 (citing numerous examples). Just this month, for example, SBC once again began improperly rejecting those AT&T orders that it could not provision on the requested due date, rather than assigning them the next available time as it promised to do after AT&T complained about it last year. See DeYoung/Van de Water Supp. Reply Decl., ¶ 71 and Atts. 10-11. And in March and April, yet another “one-

---

<sup>18</sup> Indeed, the SOAC/RCMAC system that suffered the failure is one of many not included in the scope of the Telcordia test.

<sup>19</sup> Hearing before the Texas House of Reps., Comm. on State Affairs, Subcomm. on Telecommunications at 60-61 (May 10, 2000).

time” systems error, entirely preventable on SBC’s part, has served to block AT&T’s entry for a period of 4 to 6 weeks into two significant cities in Texas.

In this instance, SBC failed to notify AT&T of a change in the 911 database in which customer information is stored for access by the Public Safety Administration Point. See DeYoung/Van de Water Supp. Reply Decl. ¶¶ 60-63. As a result, AT&T loaded all of its 911 information for the two new cities into the wrong database, causing significant delay in its ability to get its new switches certified for operation, and requiring all of the data to be reloaded a second time. Id. SBC then prolonged the delays in one of the cities, by failing to notify AT&T of a change in the vendor responsible for the database. Id. 65-67.

Of course, neither SBC’s marketing nor its customers were adversely affected by these changes, about which SBC was fully aware. Only competitors suffered delayed entry. Thus, SBC’s failure to provide CLECs with information about access to the 911 databases that was comparable to the information available to SBC, denied AT&T “nondiscriminatory access to 911 and E911 services,” which is a separate checklist violation and an independent ground for denying SBC’s application.<sup>20</sup> 47 U.S.C. §§ 271(c)(2)(B)(vii), (I).

But the equally important point is that this recent denial of access to the 911 database shows that other “one-time” SBC’s systems problems continue to delay and impede CLEC market entry based upon hot cut loops. SBC simply cannot be rewarded with 271 authorization when its own systems errors are delaying competitors from expanding hot-cut-based service to major cities within the state. And SBC’s February systems errors cannot be overlooked when in March and April SBC effectively delivered more of the same.

---

<sup>20</sup> SBC compounded the delays by imposing a “Catch 22” on AT&T, refusing to provide the trunking that AT&T needed to demonstrate that its new switches were 911-compliant because AT&T lacked a 911 certificate. See DeYoung/Van de Water Supp. Reply Decl. ¶ 61; see also id. ¶ 61 n.25 (noting other 911-related problems caused by SBC).

Another reason the SOAC/RCMAC outages should not be disregarded is that because AT&T's most recent data, for early May, shows that SBC's outage rate has spiked up again. See DeYoung/Van de Water Supp. Reply Decl. ¶ 70. Although these data are unreconciled, AT&T's experience suggests that the final results will demonstrate a significant jump in outages once again. Id. The cause at this point is unknown – perhaps it will turn out, once again, to be a one-time error. But this would only underscore the importance of insisting that SBC actually achieve the level of performance on outages that this Commission deemed minimally acceptable for a sustained period of time.

#### **4. SBC's Outage Rate Should Be Measured Based On Orders**

SBC's final departure –condoned by the TPUC – from the NY Order is its insistence on reporting SBC's outages on the basis of lines, rather than orders. TPUC II 12. This, too, is arbitrary.

First, the NY Order calculated outages on the basis of orders. That is appropriate, because customers – particularly the small to mid-sized businesses served by hot cut loops – typically have no spare capacity. They have all the lines they need, and they need all the lines they have. See DeYoung/Van de Water Supp. Reply Decl. ¶ 77. They are thus upset – and can suffer significant harm – if an outage occurs on only one of four or five lines. Id. An order-based analysis is thus a highly relevant and important measure of competitive impact.

The TPUC offers no evidence or analysis to justify abandoning an order-based analysis. To the contrary, it conceded the logic of order-based analysis in its comments on SBC's first application for Texas. There, while the TPUC stated that an outage on one loop in a 23-loop order might not disrupt normal business functions, it also conceded that an outage on one loop on a three-line order means "the customer is more likely to suffer immediate consequences." TPUC I Reply 9 n.13. Because two-to-three line orders are the average for AT&T, and because the industry appears to average no more than 5 loops per order, the TPUC's own analysis confirms

that, given average order volumes, an order-based assessment is appropriate.

The TPUC nevertheless notes that it “worked diligently” to develop performance measures for hot cuts that are based on lines. TPUC II 3. But the TPUC failed to develop a performance measure that captured defective cutovers; that omission – plus SBC’s unreliable reporting – necessitated the joint data reconciliations that have provided the TPUC and this Commission with order-based outage data. There is no substitute today for the reconciled outage data – no combination of line-based performance measures captures all the outages that SBC causes. The TPUC’s efforts to develop lines-based performance measures thus cannot justify its failure to address the plainly relevant order-based reconciled data.

The TPUC also claims that “Texas is not New York, and performance measurements are not necessarily ‘one size fits all.’” *Id.* But the TPUC has identified no differences that are material to hot cuts. In particular, as noted above, the TPUC has put forth no evidence that business customers in Texas accept the loss of service on their telephone lines more readily than do business customers in New York.

In sum, reconciled, order-based outages data is readily available. That is the basis of the analysis in the NY Order. The TPUC provides no basis for its decision to ignore that data and focus exclusively on lines instead.

Second, the TPUC compounds its error by neither addressing the need for nor providing a benchmark for evaluating line-based outage rates that would permit a fair comparison to order-based outage rates. The record shows that measuring the CHC outage percentage for December and February by lines results in a lower CHC outage rate than measuring by orders. This failure-to-explain is all the more remarkable given the criticism by DOJ and other parties of SBC’s prior attempt to mix-and-match its line-based outage rate with the order-based performance standard in the first application.

Thus, the steps required to reduce SBC’s reconciled outage rate from 16.7% to 1.68%, are

largely undefended and in any event unnecessary. The record leaves no doubt that SBC is causing more outages than Bell Atlantic did, that these outages last, on average, a full business day, that they harm the customers who suffer them, and that they impede CLECs' ability to compete with SBC. Unless this Commission is prepared to hold that Texas consumers are less deserving of protection from service outages than New York consumers, it must deny SBC's application on this ground alone.

**B. SBC's On-Time Performance Is Inferior To Bell Atlantic's**

SBC's self-reported performance data also show, definitively, that SBC has failed to meet the 90% on-time performance that the Commission found that Bell Atlantic achieved. Moreover, as discussed further below, SBC's self-reported data likely overstates its performance.

The TPUC avoids these conclusions only by improperly excluding, once again, a category of on-time performance that this Commission considered when it held that 90% on-time standard was minimally acceptable in the NY Order. The TPUC focuses exclusively on SBC's reported performance for CHC cutovers under PM 114.1, which measures cutovers that are not completed on time.

Bell Atlantic's on-time performance, however, was measured by looking not only at cutovers completed late, but also at cutovers that were started too soon. NY Order ¶¶ 296 n.946, 301 n.959. Indeed, even SBC's witnesses concede the relevance of early cuts to on-time performance; see Conway/Dysart Supp. Aff. ¶¶ 8, 9, 12 (discussing results under both PM 114.1 and PM 114 as relevant to on-time performance). By looking only at prolonged cutovers, and ignoring early cutovers, the TPUC has again ignored an important part of the overall picture of hot cut performance on which the performance standard used in the NY Order was based.

The TPUC offers no facts or analysis for excluding SBC's early cuts (i.e., PM 114) from its analysis of SBC's performance. Perhaps, again, its concern was to avoid double-counting. But because the TPUC also appears to advocate that early cuts not be counted as outages, the

TPUC's approach does not result even in "single-counting" of early cuts. In any event, to compare SBC's on-time performance with Bell Atlantic's performance, either early cuts must be included, or the performance standard must be raised. Because the TPUC provides no alternative standard, it is appropriate to consider the data for both PM 114 and PM 114.1 against the 90 percent standard.

Assuming these data are valid, they show that SBC has not demonstrated on-time performance equivalent to Bell Atlantic's on-time performance for orders involving 10 or fewer loops. For the three months combined, the data cited by the TPUC show that SBC was late on 10.1% of the loops it cut over, and was early on 4.45% of the loops it cut over, for a total on-time percentage of 85.47%. See TPUC II 16, 18. This preliminary figure already is significantly less than the 90% on time percentage that Bell Atlantic achieved.

Second, this figure of 85.47% likely overstates SBC's performance as compared to Bell Atlantic's. The majority of the loops reported in the new "all-CLEC" data have not been reconciled with the affected CLEC, and thus, those data have not been corrected for the under-reporting that AT&T found in its reconciliation with SBC. That is true with respect to both measures of on-time performance.

Specifically, the data on PM 114.1 have not been corrected for the "gap" problem that changed the reported interval (and reflected an average delay of nearly 30 minutes) for 14.5% of AT&T's CHC orders.<sup>21</sup> See DeYoung/Van de Water Supp. Rep. Decl. ¶ 92 & Att. 14. Similarly, the data on PM 114 have not been corrected for the significant under-reporting of premature disconnects (discussed above) that AT&T also found in its reconciliation. See id. ¶ 86; cf. id.

---

<sup>21</sup> The TPUC still fails to acknowledge that PM 114.1, as currently defined, has a gap: it does not measure the time it takes for the LOC technician to call the CLEC and tell the CLEC that SBC has completed its work on the CHC cutover. This is critical, because the CLEC does not activate the customer's switch translations until it receives the "all-done" call from SBC.

¶ 71.

These errors raise significant doubt about the accuracy of SBC's reported data (which SBC's continuing restatements of data further underscore). At the very least, they shift the burden to SBC to demonstrate that these errors do not affect all CLECs, and neither SBC nor the TPUC has made that factual showing. Because SBC's on-time data for all CLECs do not account for these errors, they likely overstate SBC's level of on-time performance. Thus, SBC has not shown that its on-time performance meets the minimally acceptable level approved in the NY Order.

**C. SBC's Reported Trouble Rate Is Too High**

The TPUC relies exclusively on SBC's "I-10 trouble reports" to conclude that SBC has met this requirement. TPUC II 23-24. These reports show, however, that SBC has failed to meet the "fewer than 2%" standard that the Commission deemed minimally acceptable in the NY Order. Id. 24. The TPUC thus falls back on SBC's excuse that the I-10 reports may be higher because they "capture[] three additional days in which trouble reports could be filed." Id.

As AT&T previously explained (at 37), SBC manually generated the I-10 reports for this proceeding, and therefore could and would have generated I-7 reports instead if those had demonstrated compliance. The only reason for a 10-day report is to create the very excuse that the TPUC uncritically accepts.

Moreover, the TPUC's own I-30 performance measure for troubles shows a consistent trend of discriminatory performance for SBC that continued in March. See TPUC 32; DeYoung/Van de Water Supp. Reply Decl. ¶101. Thus SBC continues to impose more troubles on new CLEC lines than on its own. Id.

Finally, it is worth noting once again that SBC's trouble rates include service outages that are customer affecting but that are not captured in the reconciled AT&T/SBC outage data. These are outages that are not caught by either SBC's or AT&T's technicians before AT&T accepts the

order, but are reported thereafter. Such outages were included in the NYPSC's calculation of Bell Atlantic's outage rate, but have not been counted against SBC. By overlooking this fact as well, the TPUC understates both SBC's outage rate and the significance of the troubles that SBC has reported.

**D. SBC's Flawed Data Collection Processes And Incomplete Performance Measures Also Deny CLECs A Meaningful Opportunity To Compete**

The TPUC makes no mention of the serious data collection and reporting problems that have consistently plagued SBC's self-reported data and rendered it unreliable. DeYoung/Van de Water Supp. Decl. ¶¶ 79-84. It does not even acknowledge the pending and detailed list of action items that SBC must address if it is to overcome these deficiencies. *Id.* And the TPUC continues to misunderstand and misstate not only what data are captured by the existing hot cut performance measures, but what data are intended to be captured by the proposed ones. DeYoung/Van de Water Supp Reply Decl., ¶¶ 104-06.

The TPUC's related assumption (at 14, 15, 19, 20) that only CLECs that doubt the veracity of SBC's reported data will engage in data reconciliation has no factual basis. The reality is that data reconciliation is an enormously expensive and time-consuming process that operates itself as a barrier to meaningful competitive entry. AT&T Supp. 37-39. The Commission should therefore insist, as a concomitant to proof of nondiscriminatory hot cut provisioning, that ILECs demonstrate the accuracy and reliability of their data collection and reporting processes. SBC has not done so.

**III. SBC HAS NOT ESTABLISHED COST-BASED RATES FOR THE UNE-PLATFORM**

AT&T established in its opening comments on SBC's first Texas application that there was no cost-basis for three non-recurring glue charges that SBC imposed on each UNE-P order. AT&T Initial 50-55. AT&T then demonstrated, in its opening comments on SBC's second Texas application, that SBC had now admitted in briefs before the TPUC that SBC has never set forth